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SUPREME COURT, U.S.

No. 06-694

In The Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL WILLIAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is, and has been since its formation 25 years ago, a fierce defender of the right of free expression. Our mission is to provide free legal representation for those whose First Amendment free speech rights have been infringed, and we do this regardless of the nature of the speech or ideas expressed. The Institute is a staunch believer in the free marketplace of ideas concept—that where all ideas are given the opportunity for expression, the best ones will ultimately flourish.

The First Amendment guarantees all individuals the right to express their thoughts and ideas, whether those thoughts and ideas are lofty and noble, unconventional and distasteful, or just plain silly. However, the First Amendment does not protect speech that constitutes child pornography or that panders it. The Rutherford Institute recognizes the government's legitimate need to restrict certain types of expression that have been deemed by this Court to be so harmful, so utterly without redeeming social value, that they simply cannot be considered to exist on the same plane as other speech.

By upholding the PROTECT Act, this Court can allow the government to protect our nation's children by properly addressing the growing social evil of online child pornography. Because the PROTECT Act does not transgress the boundary between unprotected and protected speech, the Court can allow the government to use this tool without interfering with the universe of individual liberties secured by the First Amendment.

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[1] Counsel of record to the parties in this case has consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37. No counsel to any party authored this brief in whole or in part.

SUMMARY OF THE ARGUMENT

Child pornography is a malignant cancer that has metastasized to the channels of everyday communication through the Internet. In passing the PROTECT Act, Congress put forth its best effort to equip law enforcement with the requisite tools to address this burgeoning blight. Careful to precisely define the type of expression that may be proscribed according to this Court's prior constitutional adjudications, Congress included the so-called "pandering provision" to allow law enforcement to target those who propose to exchange child pornography, whether commercially or socially. Respondent Williams would have this Court declare the PROTECT Act's pandering provision facially invalid due to the alleged defects of overbreadth and vagueness.

Amicus is no friend of censorship or suppression. In fact, the mission of The Rutherford Institute is to eliminate First Amendment threats wherever they exist. However, the First Amendment provides no solace for the type of expression at issue in this case. The First Amendment's guarantee of free speech was not intended to protect the pandering of material as fundamentally valueless as child pornography. Moreover, the government's compelling interest in ridding society of this cancer easily outweighs any veneer of worth that expressions lying on the fringe of the statute's scope might claim. In short, while The Rutherford Institute is a staunch defender of the First Amendment's guarantees, the Institute recognizes that some expression—such as that at issue here—is so utterly lacking in value that it is simply not entitled to claim the bulwark of protection offered by the First Amendment.

Finally, the Eleventh Circuit's holding that the statute is unconstitutionally overbroad and vague either

misinterprets or misapplies the language of the statute. To the extent that the Eleventh Circuit's hypothetical examples raise valid concerns about the potential scope of the statute, said concerns are adequately resolved by the fact that only individuals who possess specific intent to propose the exchange of the covered materials fall under its prohibitions. Moreover, since the speech targeted by the PROTECT Act—pandering of illegal child pornography—is clearly commercial in nature, the Eleventh Circuit's conclusion that noncommercial speech may be unconstitutionally reached is fatally flawed.

ARGUMENT

I. The First Amendment Does Not Protect the Communications in Question From Government Regulation.

Respondent's position, now embodied in the Eleventh Circuit's holding in this case, is that the PROTECT Act's pandering provision is unconstitutionally overbroad and vague because there is a possibility that it might be applied to non-commercial offers to exchange material that is either non-existent or does not, in fact, constitute illegal child pornography. See App. 22a-23a. This concern must always be discussed in light of the fact that said offers would only be covered by the statute when the party either believes that the material is child pornography or intends that the other party believe that it is such.

In this context, *amicus* submits that the expression in question simply does not fall within the ambit of the First Amendment. Moreover, even if the First Amendment did provide some minute level of protection for this expression,

the government's compelling interest in ridding the Internet of child pornography clearly overrides the speaker's "interest" in communicating these "messages."

"The protections afforded by the First Amendment ... are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003). In determining which narrow classes of speech may be proscribed without offending the letter or spirit of the First Amendment, the Court has balanced the intrinsic value of the speech in question against society's interest in order and morality. (For a concise analysis of the rationale used by the Court in finding that the First Amendment permits certain categories of speech to be proscribed, see Norman T. Deutsch, "Professor Nimmer Meets Professor Schauer (and Others): An Analysis of 'Definitional Balancing' as a Methodology for Determining the 'Visible Boundaries of the First Amendment,'" 39 Akron L. Rev. 483, 500-528 (2006)). As the Court stated in 1942,

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such

> utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (*quoting Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1940)) (internal citations omitted).

Categories of expression that fall under these narrow categories of proscribable speech include obscenity, defamation, incitement, fighting words, true threats, speech that provokes a hostile audience, advocacy of illegal action, deceptive commercial speech, speech that invades privacy, and, of course, child pornography.

Amicus respectfully submits that the expression upon which the Court is now focused, that which is not itself child pornography but which panders it in the manner described by the PROTECT Act, can and should be proscribed according to the rationale used in creating these other categories of non-protected speech. The rationale behind three of the categories, in particular, applies with equal or more force to the type of expression in question here.

A. The Communications in Question are Proscribable for the Same Reason that Obscenity is Proscribable.

While the pandering of purported child pornography does not itself qualify as obscenity, the pandering expression covered by the statute is utterly without redeeming social value. Regardless of whether the underlying material actually qualifies as child pornography, and even regardless of whether or not any underlying material actually exists, there is simply no value whatsoever in speech that is intended to promote child pornography.

As Chief Justice Burger stated, "[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." *Amicus* respectfully submits that the "grand conception of the First Amendment and its high purposes" would be equally demeaned by allowing the pandering of child pornography (or purported child pornography) to take refuge under them.

B. The Communications in Question are Proscribable for the Same Reasons that Incitement and Threats are Proscribable.

The rationale behind the Court's creation of the non-protected speech categories of incitement and threats applies to the expression that is the heart of the Eleventh Circuit's concern in this case. In ruling that speech falling within these categories may be proscribed, the Court has focused on the likely effects of the communication. Speech may be

prohibited as incitement where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (*quoting Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)). The justification for prohibiting threatening speech focuses on the effect that such speech has on the receiver of the communication. The typical effect of a threat is the response of fear in the recipient. This Court has specifically noted that the speaker need not even intend to actually carry out the threat since the prohibition of threats is meant to protect individuals from the *fear* of violence, which would be the likely response on the part of the receiver. *Id.* at 359-60.

With these two types of expression, the value of the communications themselves is negligible, if existent at all, and the harm likely to be caused by their very utterance is great. Thus, the Court has determined that these communications are not entitled to First Amendment protection.

The communications that fall within the scope of the PROTECT Act's pandering provision effectively amount to incitement. Where the panderer of illegal child pornography has the requisite intent to exchange the illicit material, it is overwhelmingly likely that he or she will succeed in making such an exchange. Illegal activity, then, is the probable result of the pandering prohibited by the statute.

Using the Eleventh Circuit's hypothetical example, if a promoter offers to trade his video of "Our Gang" with an online pal "in a manner" either "that reflects the belief" or "that is intended to cause another to believe" that the material contains illegal child pornography, it is overwhelmingly likely that the online pal will respond in kind with materials that he or she believes to be illegal child pornography. This would be the probable effect even where

the promoter actually has no material to exchange. In fact, in that situation, it seems that his only motivation for claiming to have illegal child pornography would be to elicit child pornography from the receiver of his communication. Moreover, it is overwhelmingly likely that the person who promotes "Our Gang" as illegal child pornography and believes it to be just that has other, more sinister volumes in his collection that he will soon be sharing as well.

The Eleventh Circuit's opinion indicates that it did not even seriously consider the possibility that communications that fall within the scope of the pandering provision might constitute incitement. *Amicus* respectfully submits that, by operation of the same rationale applied to incitement, the pandering of child pornography should be considered non-protected speech under the First Amendment.

As with incitement, the Court's rationale for allowing threatening speech to be proscribed focuses on its undesirable effect. With threats, however, the primary probable effect to be avoided is fear on the part of the receiver, as well as "the disruption that fear engenders." *See Virginia v. Black*, 538 U.S. at 360. This rationale applies with equal force to the pandering of child pornography that falls within the scope of the PROTECT Act. The Eleventh Circuit's opinion in this case appears to overlook the interests of potential unwilling recipients of the pandering communications. These potential unwilling recipients have a right to be free from the fear and disruption that would be caused by receiving an e-mail or other message advertising, promoting, presenting, distributing, or soliciting illegal child pornography.

Imagine, for instance, that a mother of two young children is the recipient of such an unsolicited communication. In addition to the disgust and mental

anguish she would undoubtedly experience upon receiving the offer, she would very likely experience a legitimate fear of potential legal prosecution for being somehow involved in the seedy operation. Her suffering will be the same whether what the sender of the communication actually has is "a video of 'Our Gang,' a dirty handkerchief, or an empty pocket." See App. 23a.

Because threats are proscribable on the basis of their effect on the audience, they may be proscribed regardless of whether or not the speaker is capable of carrying them out or intends to do so. *See Virginia v. Black*, at 360. Likewise, *amicus* respectfully submits that this Court should hold that the type of communication that falls within the PROTECT Act's pandering provision may be proscribed even where the communicator cannot, or does not, intend to actually exchange illegal child pornography.

C. The Communications in Question are Proscribable for the Same Reason that Defamation is Proscribable.

The Court has held that the First Amendment does not protect the category of speech known as defamation. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This is because defamatory speech is at once untrue and harmful to others, and, as such, it does not contain sufficient value to outweigh the government's interest in proscribing it. According to this same rationale, *amicus* respectfully submits that where an individual falls within the scope of the PROTECT Act's pandering provision, but does not actually possess any illegal child pornography, his communication may be proscribed according to the rationale underlying the Court's defamation jurisprudence.

One of the primary reasons for the Eleventh Circuit's holding that the PROTECT Act's pandering provision is unconstitutionally overbroad was its concern that the provision could, in some instances, be used in prosecuting an individual who falsely claimed to possess illegal child pornography. *Amicus* respectfully submits that the Eleventh Circuit's concern for the protection of liars who would engage in this raunchy discourse is misplaced.

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Gertz v. Robert Welch*, 418 U.S. 323, 339-40 (1974) (internal citations omitted).

While the government may have no legitimate interest in punishing the casual lie, false offers to exchange illegal child pornography, perhaps even to a greater extent than many defamatory statements, are extremely harmful. Society as a whole is harmed by the perpetuation of a market

that inflicts grievous harm upon its most vulnerable members. The unwilling potential recipient of the communication is harmed by the mental anguish of receiving the disgusting message and the fear that law enforcement may believe him or her to be involved in child pornography. And finally, children are harmed by the fuel that this communication adds to the fire of the child pornography industry.

II. The PROTECT Act Targets Commercial Speech that Advocates Illegal Conduct, as Well as Fraudulent and Misleading Communications that are Afforded No First Amendment Protection.

A. The PROTECT Act Applies Almost Exclusively to Commercial Speech.

By passing the PROTECT Act, Congress targeted and criminalized a narrow and very specific category of proscribable speech, namely, commercial speech that encourages and promotes illegal child pornography. Yet, the Eleventh Circuit held that the PROTECT Act's "pandering" provision violates the First Amendment because, under its analysis, the provision reached beyond commercial speech and unconstitutionally interfered with the more protected category of non-commercial speech.

The lower court intimated that the PROTECT Act extends too far by encompassing a group of situations where child pornography is discussed or exchanged, presumably with no exchange of currency and, therefore, touching upon non-commercial speech. Clearly, the inference drawn by the court was that in those circumstances where no financial or contemporaneous trading occurs, no commercial activity

occurs. And therefore, by extension, any speech relating to that non-commercial activity is non-commercial speech. While the court may have been correct in its factual observation, its analysis errs in restricting application of the commercial speech doctrine to exchanges involving monetary currency. The result is an ill-conceived loophole, whereby speech pandering child pornography—speech that is actually commercial in nature—is granted access to the great umbrella of constitutional protection reserved for non-commercial speech.

Indeed, in order for this Court to mark a clear and consistent path for its commercial speech doctrine, it must recognize that commercial activity to which speech relates often does not include direct exchange of goods and currency. To restrict the doctrine to such scenarios would be to approach the expansive universe of commerce blindly. Commercial transactions often occur when a good is exchanged today with the reasonable expectation that a reciprocal obligation or benefit will be realized in the future. After all, this is the textbook example of the barter model. To go even further, however, *amicus* would submit that commercial activity even exists when a savvy salesperson obscurely promotes or bolsters his/her product at such a time that the budding buyer is yet to even realize that he/she has become a likely participant in a commercial transaction. Clearly, such circumstances are "commercial" in the sense that they "[r]elate[] to [and are] connected with trade and traffic or commerce in general." *Black's Law Dictionary* 184 (Abr. 6th ed. 1991).

We see these and similar models taking place in the life of business all the time. For instance, requirements contracts clearly include an element of future expectations. But we also see this model at play in many online internet communities, particularly websites that facilitate the free

exchange of music and, for purposes of this case, child pornography. Within these internet communities, the unspoken—but very real—expectation is quite evident: You may receive a specific good (song or pornographic depiction of children), but you had better return the favor by providing the same or similar good for others when you can. Otherwise, these facilitating websites would be unable to survive, or even worse thrive, about which Congress seemed to be concerned. In effect, what occurs is a commercial hub of like-kind exchanges and *quid pro quos*, which are every bit as commercial as an immediate exchange of goods for other goods or currency. In the same way, mere chats within these same communities that relate to child pornography clearly lead to and are closely associated with imminent exchanges of downloads depicting child pornography. Consequently, speech relating to this type of commerce, including the class of speech that concerned the lower court, is commercial speech in the same way that a cigarette ad is commercial speech. Despite their differences in form, each promotes, or at least relates to, a potential and sought-after commercial transaction.

Moreover, the Eleventh Circuit determined that the PROTECT Act reaches non-commercial speech by expressing its concern over the statute's application to a small handful of hypothetical situations. For example, the court noted, "In a non-commercial context, any promoter—be they a braggart, exaggerator, or outright liar—who claims to have illegal child pornography materials is a crime…even if what he or she actually has is a video of 'Our Gang,' a dirty handkerchief, or an empty pocket." See App. 34a. Likewise, the court hypothesized that a grandparent forwarding emails that include innocent pictures of children in the bathtub could be prosecuted under this statute. See App. 40a-41a.

However, such an analysis fails to recognize this Court's repeated hesitation to strike down a statute on its face due to a small number of imagined scenarios. This Court has made clear that "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). See also *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961, 967 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"). Instead, in order for an overbreadth challenge to stand, the opponent must show that there are "realistic" threats to protected speech. *Id.* at 801.

Consequently, the Eleventh Circuit's conclusion that the PROTECT Act goes too far in reaching the more protected category of non-commercial speech is fatally flawed. With the exception of a small number of imaginary circumstances, the PROTECT Act encompasses commercial speech—more particularly, illegal and fraudulent commercial speech. Indeed, the statute merely regulates direct illegal conduct by proscribing only speech in which the speaker knowingly "advertises, promotes, presents, distributes, or solicits" material that is or purports to be illegal. 18 U.S.C. 2252A(a)(3)(B) (2000 Supp. IV 2004). As Congress explained when passing this bill, "[t]he crux of what this provision bans is the offer to *transact*" in clearly proscribable child pornography. S. Rep. No. 2, 108th Cong., 1st Sess. 12 (2003); see H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61 (2003) (emphasis added).

B. It is a Cornerstone Principle of This Court's First Amendment Jurisprudence that Commercial Speech that Panders Illegal Conduct or is Fraudulent or Misleading Enjoys No Constitutional Protection.

This Court has judiciously declared, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Indeed, this theme has been placed at the heart of this Court's First Amendment jurisprudence for at least the past half-century, particularly in cases regarding commercial speech. As this Court has aptly observed, "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 454 (1978).

Although *amicus* staunchly defends the freedom of expression and speech that is integral to the First Amendment's attempt to guarantee an open and robust free exchange of ideas, even we recognize that a small class of speech is so harmful to society that it finds itself utterly without constitutional protection. It has been for this reason that this Court has identified certain categories of speech that lie outside the umbrella of protection afforded by the First Amendment, including fraudulent and illegal commercial speech. In *Ohralik v. Ohio State Bar Assn.*, for instance, this Court determined that a lawyer's in-person solicitation of business with prospective clients posed a significant

potential for harm to those prospective clients and society in general. 436 U.S. 447. Consequently, this Court held that the right of a lawyer to speak about his or her services in this manner was outweighed by the great potential for harm to society.

Likewise, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, this Court noted, "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." 413 U.S. 376, 389 (1973). There, for example, Justice Powell, writing for the majority, went onto to explain, "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." *Id.* at 388. "Nor would the result be different," Justice Powell continued, "if the nature of the transaction were indicated by placement under columns captioned 'Narcotics for Sale' and 'Prostitutes Wanted' rather than stated within the four corners of the advertisement." *Id.*

As these cases have illuminated over time, commercial speech that directly pertains to illegal activity enjoys no First Amendment protection and, thus, can be proscribed by the state. Perhaps this fundamental principle was best articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). In that case, the Court considered whether a regulation by the New York Public Service Commission that completely banned Central Hudson Gas & Electric Corp. from advertising to promote the use of electricity violated the First Amendment. Finding that the ban at issue did, as a

matter of law, violate the electric utility company's right to free speech, the Court went on to significantly crystallize the extent to which commercial speech is to be protected by the First Amendment. The Court ruled, "The government may ban forms of communication more likely to deceive the public than inform it...or commercial speech related to illegal activity." *Id.* at 563-564. In essence, the Court concluded that "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Id.* at 563.

Applying these firmly established principles to the case at hand, this Court must find that the pandering of child pornography targeted by the PROTECT Act is clearly outside the bounds of legitimate speech and, therefore, is not protected by the First Amendment. Most importantly, the provision at issue only criminalizes communications that are "knowingly" made "in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" contains illegal child pornography. 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004).

As the plain language of this provision makes clear, in order to face criminal liability, the person must know that he or she is pandering illegal child pornography, which is clearly proscribable speech. Indeed, in the same way that this Court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* determined that speech used to promote and advertise prostitution and narcotics would be without First Amendment protection because it involves the pandering of illegal activity, the speech encompassed by the PROTECT Act—speech used to pander illegal child pornography—is likewise without constitutional protection. 413 U.S. 376 (1973). As this Court declared in *New York v. Ferber*, 458 U.S. 747, 761 (1982), the state has a "particular

and more compelling interest in prosecuting those who promote the sexual exploitation of children."

Moreover, to the extent that the provision extends beyond those individuals who pander illegal material, it clearly fails to reach beyond those communications which fraudulently lead another to believe that illegal child pornography is being offered. Yet, of course, like communications promoting and soliciting illegal economic activity, fraudulent commercial speech is equally proscribable. See *Central Hudson Gas & Electric Corp.*, 447 U.S. at 563 (ruling that the government may ban forms of communication more likely to deceive the public than inform it). See also *Friedman v. Rogers*, 440 U.S. 1 (1979); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1975).

As a result, the PROTECT Act is a constitutional attempt by Congress to reign in the horrors accompanying the widespread dissemination of child pornography. In so doing, Congress properly banned commercial speech that elicits illegal activity, defrauds others, and contributes to the exploitation of children.

CONCLUSION

For the aforementioned reasons, this Court should find that Congress's attempts to reign in the social evils accompanying child pornography by passing the PROTECT Act do not violate the First Amendment's guarantee of freedom of speech. In so doing, it should reverse the Eleventh Circuit's ruling.

Dated: June 8, 2007

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